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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: LIN 03 239 51585 Office: NEBRASKA SERVICE CENTER Date: JUL 26 2006

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner describes himself as a "Podiatric Physician/Surgeon/Instructor/Researcher" at Holland (Michigan) Foot & Ankle Center. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Counsel states that the petitioner "has already conducted important studies and written extensively. He has risen to the level of a nationally recognized lecturer on the faculty of a pre-eminent podiatric institute and a nationally published expert in podiatric medicine. His work has been cited by other scholars, validating the importance of his work."

An unattributed list of the exhibits in the record lists eight documents under "Publications/Peer Review Journal." The first article, "A Review of Myositis Ossificans," is said to originate from *Instep*, although the copy in the record does not include the title of the publication. The publication seems to be published only twice a year, judging by the "Spring/Summer 1996" date. This article, published when the petitioner was a 22-year-old medical student, is a review article that describes a medical condition but does not report any original medical research. The next document identified as a "publication" is a manuscript of a student presentation, with no evidence that the material has been published. Four of the remaining six documents are identified as chapters in annual updates of *Reconstructive Surgery of the Foot and Leg*; the last two appeared in the *Journal of the American Podiatric Medical Association*.

Regarding the claimed citation of the petitioner's work, the exhibit list refers to the "Institute for Scientific Information Citation Database" relating to the aforementioned two articles in the *Journal of the American Podiatric Medical Association*. The corresponding document in the record is an electronic mail message from the Institute for Scientific Information. The message contains bibliographic data about the petitioner's articles, but it does not identify any other articles that cite the petitioner's work. The electronic mail message offers no support for counsel's claim that the petitioner's "work has been cited by other scholars," and counsel identifies no other evidence that might corroborate that claim. The assertions of counsel do not

constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner submits documentation showing that the petitioner has spoken or taught at various seminars and gatherings. There exists no blanket waiver based on participation in educational or instructional activity, and therefore, while we acknowledge these materials, they are not *prima facie* evidence of eligibility for the waiver.

The petitioner submits copies of four witness letters. These letters, like many of the other materials in the record, were originally prepared in conjunction with an O-1 nonimmigrant visa petition that had previously been filed on the petitioner's behalf.[1] Two of these letters are nearly identical; one is signed by [redacted] Florida (co-author of one of the petitioner's published articles). Each letter calls the petitioner "a talented, highly acclaimed physician" with "many distinguished achievements," but offers no details about those achievements. [redacted] letter seems to imply that the petitioner attended or trained at the Scholl College – the letter discusses the school's reputation and then indicates that the petitioner is "one of the most talented of this already extremely talented group" – but the record contains no evidence that the petitioner ever studied or worked there. Because of these discrepancies and similarities, these two nearly identical letters are of dubious evidentiary value.

The other two witnesses have close ties to the petitioner. [redacted] Outpatient Surgery Center states that the petitioner "was an excellent student with a strong work ethic. Following his medical studies, it was an honor to have [the petitioner] as one of my junior residents." [redacted], president of Holland Foot & Ankle Center, deems the petitioner "one of the prominent podiatrists in our profession." As with the other letters, there is general mention of the petitioner's accomplishments with no discussion of what those accomplishments are, apart from the general assertion that the petitioner's professional credentials demonstrate his prominence in the field.

The letters signed by [redacted] each contain the following passage:

> [The petitioner] is also a member of and participant in a number of professional societies and organizations that require outstanding qualifications of their participants. He is a member of both the American Podiatric Medical Association and the American College of Foot & Ankle Surgeons, as well as being Board qualified by the American Boards of Podiatric Surgeons. He is a faculty member of The Podiatry Institute, one of the most prestigious continuing professional education institutions in the field of podiatric medicine.

The above passage implies that the organizations named in the paragraph "require outstanding qualifications of their participants." Otherwise, one would have to assume that the unidentified author of the letter credited the beneficiary with membership in unidentified organizations, and then immediately went on to an unrelated

[1] That petition was denied, and the appeal was dismissed.

discussion about the named organizations. We now turn to the evidence provided, to see if it supports the apparent claims about what is required to participate in these organizations.

The petitioner submits printouts from the web sites of the above-named organizations. Printouts from the web site of the Podiatry Institute, http://www.podiatryinstitute.com, do not identify the Institute's membership requirements except to state: "The Podiatry Institute is a professional group of independent, like-minded podiatrists who have all completed the three-year residency training program at Northlake Medical Center in Tucker, Georgia." The record contains no objective evidence to show that this residency training program is more rigorous, demanding, or exclusive than programs at numerous other well-regarded schools.

According to a printout from http://www.acfas.org, the web site of the American College of Foot and Ankle Surgeons (ACFAS), membership is available to podiatrists who "are certified or rated qualified by the American Board of Podiatric Surgery (ABPS)" and "are a member of the American Podiatric Medical Association (APMA)." Thus, if the ABPS and APMA do not "require outstanding qualifications," then neither does the ACFAS.

A printout from the APMA's web site, http://www.apma.org, states: "The APMA represents approximately 80 percent of the podiatrists in the country." Given that four out of every five U.S. podiatrists belong to the APMA, it can hardly be said that the APMA requires outstanding qualifications.

Printouts from the ABPS' web site, http://www.abps.org, distinguish between "board certified" and "board qualified." From the site:

> ***What is Board Qualified?***
>
> Board Qualified indicates that a podiatrist has passed the written examination for Certification in Foot Surgery, or for certification in Reconstructive Rearfoot/Ankle Surgery, and has demonstrated a level of capability in the diagnosis of general medical problems including the diagnosis and surgical management of foot diseases, deformities, and/or trauma, and those structures which affect the foot and ankle.
>
> To become Board Qualified a podiatrist must have successfully completed an approved podiatric surgical residency. A Board Qualified podiatrist may apply for certification in foot surgery within seven years of taking the written exam without retaking it.
>
> **NOTE: Board Qualified status is not a membership category of ABPS.**
>
> ***What is Board Certification?***
>
> ABPS certification indicates that the podiatrist has completed a credentialing process including required postdoctoral education, at least four years of postdoctoral clinical experience, approval of documented surgeries on all areas of the foot and ankle, and

> successful completion of written and oral examinations. Certified podiatrists are members of ABPS and are called "diplomates."

(Emphasis in original.) The above information indicates that "board qualified" status amounts, basically, to recognition of professional competence, and "board certified" status recognizes additional experience and training. Elsewhere, the web site states: "Board Qualified status [is] required before certification." Clearly, "board qualified" status is subordinate to "board certified" status. The web site also indicates that "ABPS has over 5400 active, certified members and over 1900 board qualified," indicating that the majority of ABPS-recognized podiatrists have superior qualifications to the petitioner.

Thus, nothing the petitioner has submitted corroborates the claim that any of the above "professional societies and organizations . . . require outstanding qualifications of their participants." The evident exaggeration in the letter further erodes its credibility.

On April 6, 2005, the director instructed the petitioner to submit further evidence to meet the guidelines set forth in *Matter of New York State Dept. of Transportation*. In response, the petitioner submits documentation regarding the intrinsic merit of podiatry. The intrinsic merit of podiatry is not in dispute here. Next, counsel asserts that the petitioner's published work and participation in the Podiatry Institute have national scope. It is reasonable to assert that published work can have national impact. It is more tenuous to ascribe national scope to Podiatry Institute seminars hosted by the petitioner. The day-to-day practice of podiatry is not national in scope; the direct impact of such practice is limited to individual patients. Therefore, the petitioner appears to have met the first two prongs of the national interest test from *Matter of New York State Dept. of Transportation*. Of course, intrinsic merit and national scope do not automatically demonstrate eligibility for the waiver. It remains for the petitioner to show that it is in the national interest for him, in particular (rather than some other qualified podiatrist) to hold his current position.

The petitioner submits an updated *curriculum vitae*, which, counsel states, demonstrates the scope of the petitioner's reputation and accomplishments. The petitioner's own assertions about his achievements carry negligible weight as evidence. We note that the list of published articles in the updated *curriculum vitae* does not show any new publications compared to the older publication list submitted previously, and the record does not identify the petitioner as a major participant in any ongoing research that would likely result in future publications.

The petitioner submits new witness letters, along with copies of the letters submitted previously. A new letter signed by [redacted] includes passages found in previous letters signed by [redacted] A new passage indicates that the petitioner "is an exceptional physician, distinguished in many ways. He truly is substantially superior to many others in his field of medicine."

[redacted] in a new letter, asserts that the petitioner "routinely is called upon for case consultations on difficult cases from physicians throughout the United States." The record includes no first-hand evidence to establish the nature or frequency of these consultations.

Sally Mulder, CEO of Elkins Innovations, Inc., states:

> [The petitioner] is an exceptional practitioner in the field of podiatric medicine and surgery. He has a distinguished history of educational experience and professional accomplishments. . . .
>
> Elkins Innovations, Inc. was the recipient of a grant from The National Institutes of Health in Bethesda, Maryland, for the research, development and clinical trials for a Novel wireless foot control for a prosthetic hand. . . . [The petitioner] is an essential team member and consultant to our research and development process based upon his established, exceptional knowledge in the field of podiatric medicine. . . . [The petitioner's] participation as an expert in foot and ankle medicine is essential to the success of our research and development efforts with a significant impact to the national health situation in the United States.

The November 2003 grant application submitted to the National Institutes of Health (NIH) identifies three "Key Personnel," all Elkins employees, including principal investigator Renard G. Tubergen. The grand application also lists eight consultants, each to be involved for between two and eight days. The petitioner is one of these consultants. His two stated tasks are to "perform initial examination" and "further presence during re-assessments," for a total of five days. There is no indication in the NIH documents that the petitioner is involved in the design of the device, or in its testing beyond the "initial examination" and "re-assessments."

Dr. Jay Levrio, deputy executive director of the APMA, states that the petitioner "has distinguished himself on a national basis in several areas," such as participating in the surgical residency at Northlake Regional Medical Center and "extensive continuing education lecturing opportunities." Most of [redacted] letter discusses podiatry in general. [redacted] executive director of the Podiatry Institute, devotes most of his letter to a discussion of the Institute. With regard to the petitioner, he states that the petitioner is "one of the more highly trained podiatrists in his area" and that the petitioner "has already made substantial and exceptional contributions to his profession through his writings, research and lecturing. He is clearly in the top echelon of clinician lecturers with a professional record that rises above the substantial majority of the national field of licensed podiatric physicians." As with the previous letters, there is little explanation regarding the nature of the petitioner's contributions, except for the assertion that the petitioner has been associated with prestigious organizations.

The director denied the petition on August 19, 2005. The director acknowledged the intrinsic merit of the petitioner's work, and found that some of the petitioner's activities are potentially national in scope, but the director also determined that the petitioner has not shown that a waiver of the job offer/labor certification requirement would be in the national interest. The director also acknowledged the petitioner's published articles, but observed that "[t]he record does not identify the citation frequency of the petitioner's publications or establish that the results of the petitioner's work have been widely implemented." The director stated: "The petitioner must show that beyond simply having had success, he has a past record of specific prior achievement that justifies projections of future benefit to the national interest. The documents of record do not adequately establish a sustained pattern of achievement at this point in the petitioner's career justifying prospective future benefit."

On appeal, counsel argues that the stated basis for denial "is generalized, contrary to the record and raises the spectre of an opinion manifesting pre-determinative outcome. As such, it is an abuse of discretion." Later in the appellate brief, counsel contends that the director's conclusion is "possibly intended to justify a pre-conceived outcome." Counsel does not elaborate on this point. Judging from other assertions that counsel offers on appeal, the argument seems to be that the petitioner is so obviously eligible that the denial can only be attributed to the director's prejudice. We do not share counsel's assessment of either the director's decision or the evidence underlying that decision. The burden is not on the director to prove ineligibility or rebut the petitioner's claims; rather, the burden is on the petitioner to establish eligibility. There is no presumption of eligibility.

Counsel argues that the petitioner's "body of professional accomplishments clearly demonstrates that among his professional peers of Podiatric physicians, [the petitioner] is one of the very best having achieved levels rarely achieved by other Podiatric physicians." The key to establishing eligibility is the evidence itself, not counsel's interpretation of that evidence, such interpretation being designed to present the petitioner's claim in the most favorable possible light. Elsewhere in this decision, we have cited ample case law (such as *Matter of Ramirez-Sanchez* at 506) to support the position that the assertions of counsel do not constitute evidence.

Counsel states that the petitioner's published articles represent "an extraordinary accomplishment when compared to [the petitioner's] peers in the field of podiatric medicine." The record contains no objective documentary evidence to show that the petitioner's published work is "extraordinary" in terms of either quantity or impact. The petitioner cannot establish eligibility for the waiver simply because he has produced published research work.

Regarding the citation of the petitioner's work, counsel states:

> Petitioner's record includes a copy of a letter from the Research Manager of Thomson Scientific [formerly the Institute for Scientific Information], the world's only citation index database of scientific journals. The Thomson Scientific index reflects the articles published by [the petitioner], but notes that they have not been frequently cited yet because of the recency of their publication. (**N.B.** The AAO has held that the lack of frequent citation is not a bar to eligibility.) Thomson ISI also notes:
>
> > "The lack of citations to his publications is not surprising to me because our database indexes relatively few podiatric medicine journals, particularly as compared to the large numbers of journals we index in other scientific fields. Because Web of Science is the most comprehensive scientific journal database in the world, this suggests to me that research in podiatric medicine is weakly represented in our database (and others)."

Regarding the "copy of a letter from the Research Manager of Thomson Scientific" quoted by counsel, we can find no such letter in the record of proceeding. The exhibit list submitted with the initial submission makes no reference to such a letter, nor does counsel's lengthy letter that accompanied the petitioner's

response to the request for evidence. Counsel does not identify the "Research Manager" by name or submit a copy of the letter on appeal.

Assuming that this letter exists and that counsel has quoted from it accurately, the quotation, with its reference to "our database (and others)," contradicts counsel's assertion that Thomson Scientific is "the world's only citation index database of scientific journals." The quotation indicates only that Thomson Scientific does not track a large number of podiatric journals; it does not address the more relevant question of how the petitioner's citation rate compares with that of others who publish in the same journals. We note that, at the time of filing, counsel stated that the petitioner's "work has been cited by other scholars." Only after the director noted the absence of evidence of such citations has the discussion shifted to an explanation for that absence.

Counsel claims that "only 0.009% of all podiatric physicians are published." Counsel cites no source for this statistic. Even assuming this figure to be correct, it does not follow that published podiatrists are better than those who devote themselves entirely to clinical patient care, or that published podiatrists represent the "top" 0.009% of the field. Not every podiatrist is necessarily a researcher, and there is certainly nothing in the record to lead us to conclude that 99.991% of all podiatrists are failed authors who have been frustrated in their attempts to produce published work.

In this way, counsel repeatedly asserts that the petitioner belongs to one or another small group of podiatrists (such as the Podiatry Institute), and then counsel contends that these small groups necessarily represent the top of the field. It is a fallacy to presume that "minority" implies "superiority" in this way. Statistics from the ABPS show that board certified podiatrists outnumber board qualified podiatrists by nearly three to one, placing the board qualified petitioner in a minority here as well, but board certification is a superior credential to board qualification.

Publication does, of course, give a national voice to a published author; but the director has already taken this into account by granting that this aspect of the petitioner's work has national scope. At best, the petitioner's published work shows that he is a researcher as well as a clinical physician; it still remains to show how the petitioner compares to other researchers in podiatry.

Counsel is correct to state that lack of citations is not an automatic bar to eligibility, but it is equally true that the mere existence of published articles is not *prima facie* evidence of their author's eligibility. There must be some reliable and objective gauge to show that the petitioner's articles have been especially influential in comparison to other published works in the field of podiatry. The petitioner has provided no such gauge, arguing instead that he has set himself above his peers simply by writing the articles.

Counsel devotes several pages of the appellate brief to quotations from witness letters. The evidentiary value of these letters is somewhat compromised for reasons already discussed. The letters offer praise for the petitioner's accomplishments without specifying what those accomplishments are; describe how rare it is for podiatrists to publish in certain journals, without showing how the petitioner's articles in those journals have shaped the practice of podiatry; and offer demonstrably misleading assertions about the difficulty of joining certain professional associations. Counsel protests that the director's decision "contains almost no discussion

of Petitioner's actual work," but this same criticism can be made of letters offered in support of this petition (or in support of the failed O-1 petition in 2003).

Counsel states that the director "completely overlooked" the petitioner's "critical involvement" in the NIH-funded prosthesis research described elsewhere in this decision. Whatever adjectives have been fastened to the petitioner's work in this project, his involvement appears to be peripheral rather than central. Even the petitioner's own initial submission, including a lengthy statement from counsel, did not contain any mention of this project. The grant documents indicate that the project requires the petitioner's involvement for five days. This commitment does not necessitate permanent immigration benefits. Counsel stresses that the petitioner is "the **only** podiatric member" of the "team of researchers." The evidence does not suggest that this makes the petitioner exceptionally important to the project; rather, it seems that the project simply does not require more than one podiatrist. The research team consists largely of engineers, which makes sense because the project is concerned with development of a mechanical device.

The petitioner has submitted a substantial amount of documentation. At issue in this decision is the quality, rather than the quantity, of evidence submitted. The petitioner's evidence shows him to be a clinical podiatrist who has engaged in some amount of research up until *circa* 2002, and he belongs to a small association of volunteer lecturers whose members all trained at the same facility. A number of witness letters devote more time to superlatives than to substantive details, and counsel attempts to draw a number of inferences that the documentary evidence simply does not support. The petitioner is clearly a qualified podiatrist, and he may well be an exceptional one, but the record offers no reliable or credible indication that he, distinct from others in his field, has made and will continue to make contributions of such import that it is in the national interest to waive the job offer requirement that normally attaches to the immigrant classification that the petitioner has chosen to seek.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.